No. 21-12

In the
Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
APPELLANT,
V.
TED CRUZ FOR SENATE AND **RAFAEL EDWARD CRUZ,**
APPELLEES.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brief of the Public Policy Legal Institute As *Amicus Curiae* Supporting Appellees and Affirmance

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QUESTIONS PRESENTED

The Questions Presented in the Jurisdictional Statement are:

When a candidate for federal office lends money to his own election campaign, federal law imposes a $250,000 limit on the amount of post-election contributions that the campaign may use to repay the debt owed to the candidate. 52 U.S.C. § 30116(j). The questions presented are as follows:

1. Whether Appellees have standing to challenge the statutory loan-repayment limit.

2. Whether the loan-repayment limit violates the Free Speech Clause of the First Amendment.

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STATEMENT OF INTEREST

Amicus curiae Public Policy Legal Institute ("PPLI") is a national non-profit educational charity dedicated to protecting the right of Americans to advocate for and against public policies.[1] PUBLIC POLICY LEGAL INSTITUTE, https://publicpolicylegal.com/about/ (last visited December 16, 2021). PPLI seeks, *inter alia,* to protect First Amendment rights of free speech and association in election campaigns and other advocacy. PPLI writes separately to urge the Court to provide lower courts with guidance on whether an "appearance of corruption" can be found absent a robust record evidencing actual *quid pro quo* corruption and a reasonable basis for an assertion of an appearance of corruption, an issue discussed in the lower court's analysis of Appellant's governmental interest assertion. Jurisdictional Statement Appendix ("J.S.App."), at 27a-29a.

SUMMARY OF ARGUMENT

There is a vigorous constitutional debate in this and similar cases, little-noticed, but fundamental to the First Amendment because it deals with the "appearance of corruption." The "appearance of corruption" is one of the few instances where some courts have permitted governments to restrict political expression and association because it is unpopular, using evidence

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[1] Counsel of record for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

such as public opinion polls, media coverage or consultants' testimony which would not meet this Court's modern standards for finding an appearance of corruption.

The appearance of corruption doctrine is based on a long-held concern that an appearance of corruption will reduce public trust in government. Modern research confirms that most Americans do not trust government to do the right thing, but also finds that an appearance of corruption does not cause (or contributes very little to) this "trust deficit." In fact, there is scholarly evidence that the "deficit" remedy of campaign finance regulation itself may be weakening democracy as campaign finance laws are increasingly perceived by the public as being used as a political weapon.

This Court has held that the only governmental interest sufficient to limit political speech and association is *quid pro quo* corruption (which can be measured by a factual record), and an "appearance" of *quid pro quo* corruption (which research and experience show is much harder to pin down accurately). Though commonly conflated, "corruption" and "the appearance of corruption" are different, and analyses generally use different evidence to justify governmental regulation of highly-protected political expression and association for each concern.

In today's highly-polarized political environment, it is easy to show a public perception of an "appearance of influence or access," but under this Court's recent decisions, that showing is not sufficient to justify restrictions on speech. On the other hand, it is very difficult to demonstrate a

legitimate appearance of *quid pro quo* corruption, especially if there is no record of actual *quid pro quo* corruption underlying the purported public perception. Some reviewing courts use evidence that is imprecise, misleading or simply constitutionally-impermissible under this Court's recent decisions, such as an "appearance of influence or access," or "too much money in politics," instead of an appearance of actual *quid pro quo* corruption. Put bluntly, the *quid pro quo* corruption evidentiary standard is based on fact-based explanations, while some courts seem to believe that the "appearance of corruption" standard can be based on a multi-layered and vague perception of "risk," the provenance and dimensions of which may not be apparent or reliable.

Here, it was the Federal Election Commission which tried to use flawed public opinion polling (which it drafted and commissioned as part of this litigation) and "media reports" to justify its regulation. The District Court below noted that "Such generic questions do not get at the specific problem of quid pro quo corruption the government asserts this statute combats." The FEC's misguided efforts to "prove" a nonexistent appearance of corruption were entirely predictable, and are consistent with decades of scholarly research into the dangers of the appearance of corruption doctrine. The court below correctly rejected the FEC's inaccurate and misleading justifications as inadequate to justify the violation of First Amendment rights, but other courts might not have done so.

Decisions within and among Circuits are split over whether the evidentiary standard for the

appearance of corruption is controlled by recent cases such as *Citizens United v. Fed. Election Comm'n* and *McCutcheon v. Fed. Election Comm'n,* (which permit only consideration of an appearance of *quid pro quo* corruption) or older ones such as *Shrink Missouri Gov't PAC v. Fed. Election Comm'n* and *McConnell v. Fed. Election Comm'n* (which permit evidence that does not include evidence of *quid pro quo* corruption, but includes evidence of insufficient constitutional justifications, such as an appearance of influence or access). For example, in the Ninth Circuit, Judge Ikuta and four other judges, dissenting from denial of rehearing en banc in *Lair v. Motl*, 889 F.3d 571, 577 (Mem) (9th Cir. 2018), said: "In short, the majority applies a legal standard inconsistent with *Citizens United* and *McCutcheon*, and as a result, relies on evidence of access or influence that cannot prove Montana's state interest in restricting contribution limits."

The jurisprudential question here asks whether a strong "appearance of corruption" evidentiary standard (for example, requiring a robust record of evidence of actual *quid pro quo* corruption and a reasonably-justified public perception of that corruption) is preferable to a weaker evidentiary standard (which might not require evidence of actual quid pro quo corruption and which might show only a risk of a public perception of influence or access). The lower courts need guidance, especially if the "appearance" cannot be tied solely to *quid pro quo* corruption. Otherwise, the requirement to find only *quid pro quo* corruption and its appearance could be evaded by mere

allegations and speculation about an "appearance of influence or access" or other impermissible grounds.

The Court should affirm and clarify the need for lower courts to use the evidence-based, precise and careful analysis of the "appearance of corruption" used by the District Court below.

ARGUMENT

I. The "Trust Deficit" Justification for the "Appearance of Corruption" Model Is Not Supported by Modern Research or Experience.

Among other things, this is a case about the "appearance of corruption." Democracy has long been thought to work "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). "In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (all references herein are to the plurality opinion).

The FEC's assertion of a strong anti-corruption interest rests on the "preventing corruption or the appearance of corruption" doctrine identified in *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973), *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976), and later cases. As the court below noted, "The FEC

maintains that the loan-repayment limit addresses the heightened risk and appearance of quid pro quo corruption that results from elected officeholders soliciting contributions that will be used to repay their personal loans." J.S.App., 22a.

Though often conflated, "corruption" and "the appearance of corruption" are different, especially in the evidentiary burden to be satisfied. As the lower court noted, there is no evidence of actual *quid pro quo* corruption in the record of this case: "We first observe that the FEC has not identified a single case of actual quid pro quo corruption in this context", at either the federal or state levels. J.S.App., 23a.

A. Modern Research Shows an "Appearance of Corruption" Does Not Threaten Confidence in Representative Government

An "appearance of corruption" analysis looks for a "trust deficit," that is, to see if perceptions of the public at large threaten "confidence in the system of representative Government." *Buckley*, 424 U.S. at 27; *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 390 (2000) ("[T]he cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). The "trust deficit" must be real, not just "mere conjecture." *McCutcheon*, 572 U.S. at 210 ("We 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'"), *quoting*, *Shrink Missouri Government PAC*, 528 U.S. at 392.

There is no doubt that the public generally has lost confidence in American government. As of

April 11, 2021, "Only about one-quarter of Americans say they can trust the government in Washington to do what is right "just about always" (2%) or "most of the time" (22%)." Pew Research Center, *Public Trust in Government: 1958-2021*, https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/ (last accessed December 10, 2021). Trust in government peaked at October 15, 1964, at 77%, fell to 27% on March 12, 1980, spiked to 55% on October 25, 2001, but then fell sharply to 15% on October 4, 2011. *Id.*

But the oft-professed power of campaign finance regulation to boost trust in government is subject to much doubt. In a recent book analyzing 60,000 individual observations across all 50 states from more than 50 studies between 1987 and 2017, Professors David Primo and Jeffrey Milyo ask: "But what if the conventional wisdom is fundamentally wrong?" David Primo and Jeffrey Milyo, CAMPAIGN FINANCE AND AMERICAN DEMOCRACY: WHAT THE PUBLIC REALLY THINKS, University of Chicago Press, 2020 ("CAMPAIGN FINANCE"), 3. "With thirty years of experience in American political economy, Dr. Milyo is Google Scholar's most-cited author in the fields of campaign finance and political corruption." *Republican Party of N.M. v. Balderas*, No. 11-cv-900-WJ-KBM (D. N.M., Nov. 30, 2021), at 1.

Other scholars, "reinforcing the compelling findings in Primo and Milyo, even with the heightened awareness of campaign finance issues created in the wake of" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), ask the same question: "What happens when the Supreme Court is wrong, when the foundation of decades of

jurisprudence is simply not true?" Daron R. Shaw, Brian E. Roberts, and Mijeong Baek, THE APPEARANCE OF CORRUPTION: TESTING THE SUPREME COURT'S ASSUMPTIONS ABOUT CAMPAIGN FINANCE REFORM, Oxford University Press, 2021 ("APPEARANCE OF CORRUPTION"), 1.

Both new books contend that the conventional wisdom is wrong, undercutting the rationale of a strong governmental interest in combatting the appearance of corruption.

> The bottom line is this: we find that there simply is no meaningful relationship between trust in state government and state campaign finance laws during this time period. … we want to be clear that this is a major finding running counter to forty years of jurisprudence, as well as reformers' promises and scholarly claims that reform is critical to maintaining or restoring citizens' faith in the integrity of democracy.

CAMPAIGN FINANCE, 137.

"Those researchers focused on changes in federal law discern no effect of limiting money in politics on perceptions of corruption." APPEARANCE OF CORRUPTION, 17. In fact, some research suggests that federal campaign contribution limits actually increase perceptions of corruption. *Id.* Research on state level contribution limits reaches similar conclusions. *Id.* The bottom line of this modern research is that "the salutary effects of campaign finance reform laws on political participation are questionable, at best." *Id.*, 22.

Can a governmental interest based on ignorance or misunderstanding be compelling

enough to block freedom of expression? Primo and Milyo find that "the public is stunningly misinformed" about campaign finance laws and practices. CAMPAIGN FINANCE, 51. That result echoes many other experts' analyses over the last twenty years. CAMPAIGN FINANCE, 52.

What about an interest based on cynicism, or worse? The data supports a conclusion that campaign finance restrictions not only don't cause or prevent a "trust deficit," they actually cause additional suspicion of governmental misconduct. Primo and Milyo find that "nearly half of Americans, and 40 percent of True Believers [extremely vigorous proponents of campaign finance restrictions], think that government regulations on political activities are used to harass political opponents 'almost always' or 'very often,' and only 11 percent of Americans (16 percent of True Believers) think that this occurs 'hardly ever' or 'never.'" CAMPAIGN FINANCE, 119. "No matter how we slice the data, we find a remarkably robust relationship: support for campaign finance restrictions is *increasing* in the belief that these laws are used by government officials to harass political opponents." *Id.* (emphasis in original).

B. An "Appearance of Corruption" Must Be An Appearance of *Quid Pro Quo* Corruption, Not An "Appearance of Influence or Access"

This Court has identified only one governmental interest sufficient to outweigh the considerable First Amendment rights of speech, association and petition inherent in contributions to

political candidates and campaigns: "preventing corruption or the appearance of corruption." *McCutcheon*, 572 U.S. at 191, 206, 207; *Citizens United*, 558 U.S. at 359-60; *Buckley*, 424 U.S. at 26-27. The interest must be real and precisely identified, not just "mere conjecture." *McCutcheon*, 572 U.S. at 210 ("We 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'"), *quoting*, *Shrink Missouri Government PAC*, 528 U.S. at 392.

"Corruption" is precisely defined: a "financial quid pro quo: dollars for political favors." *Fed. Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (emphasis added). "That Latin phrase captures the notion of a direct exchange of an official act for money." *McCormick v. United States*, 500 U.S. 257, 266 (1991); *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).

The Court's path to this narrowing construction has not been without debate. *See, e.g., McConnell v. Fed. Election Comm'n,* 540 U. S. 93, 153-54 (2003), and *id.,* 540 U.S. at 297 (Kennedy, J., concurring in judgment in part and dissenting in part). But seven years after *McConnell*, the pendulum swung back to Justice Kennedy's position, *Citizens United*, 558 U.S. at 359, *citing* 540 U.S. at 296-98, and there it remains. *McCutcheon,* 572 U.S. at 207-08.

This *quid pro quo* requirement applies to both corruption and the "appearance of corruption." "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was

limited to *quid pro quo* corruption." *Citizens United*, 558 U.S. at 359 (emphasis added); *McCutcheon*, 572 U.S. at 207-08 (same).

Courts also must be careful not to confuse traditional political hallmarks of democracy with the appearance of corruption: "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford", *McCutcheon*, 572 U.S. at 192, or the "appearance of mere influence or access." 572 U.S. at 208. "Ingratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. "They embody a central feature of democracy – that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon*, 572 U.S. at 192.

"The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Citizens United*, 558 U.S. at 359. In *Williams-Yulee v. Fla. State Bar*, 575 U.S. 433, 446 (2015), for example, the Court carefully distinguished between fundraising by politicians (who "are expected to be appropriately responsive to the preferences of their supporters") and elected judges ("In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors").

Nor does the anticorruption rationale include a concern about "Big Money" in politics: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not

give rise to ... *quid pro quo* corruption." *McCutcheon.* 572 U.S. at 208.

C. This Case Illustrates How It Is Easy to Show an Impermissible "Appearance of Influence or Access" But Difficult to Demonstrate a Legitimate "Appearance of Corruption:"

An unconstrained "public perception" can block speech because the public either doesn't understand the legal niceties or doesn't like it. *See e.g.,* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1, 100 (1996) ("popular attitudes toward Congress often suffer from misinformation, unrealistic expectations, and failure to appreciate the tradeoffs that legislators must make among their constituents' many incompatible demands"). This long-standing concern reinforces the difference between evidentiary standards for *quid pro quo* corruption and an "appearance of corruption." In other words, the *quid pro quo* corruption evidentiary standard is based on fact-based explanations, while the "appearance of corruption" standard is based on a multi-layered and vague perception, the provenance and dimensions of which may not be apparent or reliable.

This case offers a dramatic example of both government agency mis-steps and a reviewing court's diligent adherence to this Court's *quid pro quo* corruption limitation. Here, the FEC commissioned and drafted a seriously-flawed and misleading public opinion poll, conducted "for this litigation," to identify a "public perception" about an

appearance of corruption. J.S.App., at 27a ("The YouGov poll was conducted at the FEC's behest for this litigation to demonstrate that the loan-repayment limit addresses the appearance of corruption.").

The FEC's YouGov poll had only three questions: 1) were respondents "aware that candidates could loan their campaigns money and then be paid back with post-election contributions"; 2) how likely did respondents think it was "that individuals who donate money to a federal candidate's campaign after an election 'expect a political favor in return'"; and, 3) whether respondents thought donors would "be more likely to expect political favors" if there were no limit on repaying a candidate loan with post-election contributions. J.S.App., at 27a-28a. The FEC argued that these answers, along with "media reports," were "evidence that the loan-repayment limit addresses 'at least the appearance of quid pro quo corruption.'" *Id.*, at 28a.

The District Court below did not agree, noting "Such generic questions do not get at the specific problem of quid pro quo corruption the government asserts this statute combats." *Id.* "Even if contributors who donate to retire a candidate's debt expect political favors, that hardly demonstrates that the (now elected) official is more likely to grant such political favors." *Id.* Relying on *McCutcheon*, 572 U.S. at 208, the lower court said: "At most, the poll suggests that some members of the public distrust or are skeptical about using contributions to repay candidate loans, but the "tendency to demonstrate distrust" is insufficient to establish

corruption or its appearance. *Nat'l Conserv. PAC*, 470 U.S. at 499." J.S.App., at 29a.

The District Court's conclusion was well-justified, especially in light of the actions and testimony of the YouGov political scientist who supervised and analyzed the FEC's poll: Ashley Grosse, Senior Vice President of Client Services at YouGov.com. *See, generally,* Plaintiffs' Response to Defendant's Statement of Undisputed Facts ("Plaintiff's Response"), Joint Appendix ("J.A."), at 345-57. Of most importance may be Dr. Grosse's statement that she not only anticipated that poll respondents would conflate "access" and "corruption," but that she herself believed that: "Political favors. I would think access is a pretty big one." Plaintiffs' Response, *quoting* Deposition of Ashley Christine Grosse, May 26, 2020, 149:8-16, J.A., at 355. This does not reflect this Court's position against evidence of an "appearance of influence or access" being used as a substitute for an appearance of corruption.

Nor were respondents presented with the actual legally-relevant facts about which they were opining; for example, Dr. Grosse herself was unaware of the fact that campaigns could repay candidates before an election without limit. *Id.*, Grosse Depo. 154:14-21, 157:12-13 ("this whole topic is incredibly complex for the average American."), J.A., at 355. Again, presenting uninformed or incomplete views does not constitute a legitimate appearance of corruption.

Perhaps even more disturbing here is that Dr. Grosse did not draft the incomplete and misleading poll questions. The FEC did. "While Dr. Grosse

supervised the fielding of the survey and compilation of the results, the survey questions were written entirely by the FEC, with no advice or input from Dr. Grosse or YouGov." Plaintiffs' Response, J.A., at 346. The FEC should know not only its own law, but that its poll, sought as justification for a limitation on protected political speech and association, was misleading and incomplete. This was not a good faith effort to meet this Court's standards.

The FEC's abuses in its effort to "prove" a nonexistent appearance of corruption are entirely predictable. They are consistent with decades of scholarly research into the dangers of the appearance of corruption doctrine.

> The "appearance" rationale for contribution limits "means that the most zealous and aggressive advocates of restriction can make accusations, whether well founded in fact or not, and then use the very fact that some people believe the charges as a reason to justify regulation."

Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 178 (2001).

> A simple poll asking whether money has too much influence in politics, or whether politicians are now "corrupt," will clearly not suffice, because the Supreme Court has insisted that "*quid pro quo*" corruption is a peculiar legal concept, to be distinguished from ingratiation, access, or other more capacious notions of corruption. Furthermore, it is not clear that a poll-respondent has sufficient information, the serious and earnest demeanor, and the opportunity to deliberate—

> all of which are required to give a meaningful response on this question.

Christopher Robinson, D. Alex Winkelman, Kelly Bergstrand, and Darren Modzelewski, *"The Appearance And The Reality Of Quid Pro Quo Corruption: An Empirical Investigation*," 8 J. Legal Analysis 375, 378-79, Winter 2016, https://academic.oup.com/jla/article-abstract/8/2/375/2502553.

The lower courts have not always heeded these warnings. To find "public awareness" of inherent "opportunities for abuse," lower federal courts have relied on political campaign consultants, community activists, and political campaigns' polling, resulting in vigorous dissents from other judges seeking compliance with evidentiary requirements imposed in more recent cases. For example, in *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 386, 392-93 (5th Cir. 2018), *cert. den.*, __ U.S. __, 139 S. Ct. 639 (2018), the Fifth Circuit held that:

> The evidence presented, including testimony that large contributions created a perception that economic interests were "corrupting the system" and turning the City Council into a "pay-to-play system," as well as the fact that 72% of voters voted in favor of the base limit, is exactly the kind of evidence that the Supreme Court in *Shrink Mo.* found clearly sufficient.

Judge Ho, writing for himself and Judge Edith Jones, in dissent of denial of rehearing en banc, criticized the panel's reasoning because it did not focus on an appearance of *quid pro quo* corruption:

> The district court should have heeded Justice Thomas's common-sense observation—particularly because the record is devoid of any evidence to the contrary. The district court merely credited the City's assertion that voters in 1997 had a "perception" of "inordinate influence" based on "large contributions, in the $1000–$2500 range" — which is $1,420–$3,545 in 2015 dollars.
>
> There are numerous problems with the City's defense. It credits voter "perception" — which is perilously close to "mere conjecture." It raises amorphous concerns about "inordinate influence"—not quid pro quo corruption.

Zimmerman v. City of Austin, 888 F.3d 163, 165 (Mem) (5th Cir. 2018) (Ho, J., dissenting).

Similarly, in *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017), *cert. den. sub nom.*, *Lair v. Mangan*, __ U.S. __, 139 S. Ct. 916 (2019), the Ninth Circuit cited a pre-*McCutcheon* decision to assert a low "not illusory" evidentiary burden: "Montana need not show any instances of actual quid pro quo corruption. See *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011). It must show 'only that the perceived threat [is] not ... 'illusory.'". 873 F.3d at 1178.

> Montana's contribution limits are of the same kind as in *Shrink* and *Buckley*, and they are supported by at least as much evidence as was present in those cases. *See Shrink*, 528 U.S. at 393–94 (noting a statement from a legislator "that large contributions have 'the real potential to buy votes'"; "newspaper

> accounts of large contributions supporting inferences of impropriety"; an example of a "state representative ... 'accused of sponsoring legislation in exchange for kickbacks'" (but not convicted); and a scandal in which the former attorney general pled guilty to misusing state property to benefit campaign contributors); *Buckley*, 424 U.S. at 27 n.28 (referencing generic "abuses uncovered after the 1972 elections"). Montana, therefore, has offered adequate evidence that its limits further the important state interest of preventing quid pro quo corruption or its appearance.

Lair v. Motl, 873 F.3d at 1180.

Judge Ikuta, writing for herself and four other judges dissenting from the denial of rehearing en banc, criticized the standard used by the *Lair* panel for failing to follow the more modern cases:

> In short, the majority applies a legal standard inconsistent with *Citizens United* and *McCutcheon*, and as a result, relies on evidence of access or influence that cannot prove Montana's state interest in restricting contribution limits. As Judge Bea explains in dissent, "[w]hile the panel majority's opinion pays lip service" to *Citizens United* and *McCutcheon*'s shift, its analysis utterly fails "to account substantively for this change." *Motl*, 873 F.3d at 1191 (Bea, J., dissenting). Rather than follow *Citizens United* and *McCutcheon*, the majority undermines them. I would follow the Supreme Court and require Montana to present evidence of actual or apparent *quid pro quo* corruption.

Lair v. Motl, 889 F.3d 571, 577 (Mem) (9th Cir. 2018) (Ikuta, Callahan, Bea, M. Smith, and N.R. Smith, Judges, dissenting from denial of rehearing en banc).

The FEC argues here that "Common sense suggests, for example, that the risk of corruption is greater when an officeholder receives $2900 that he can use to pay down his mortgage than when he receives $2900 that his campaign can use to pay for more placards." Jurisdictional Statement, 19-20. But a court cannot "accept[] mere conjecture as adequate to carry a First Amendment burden." *McCutcheon*, 572 U.S. at 210. As Judge Ho pointed out in his dissent from rehearing en banc in *Zimmerman*: "Common sense" may "credit[] voter 'perception' — which is perilously close to 'mere conjecture.' It raises amorphous concerns about 'inordinate influence'—not quid pro quo corruption." *Zimmerman*, 888 F.3d at 165.

The District Court below did not accept the FEC's "common sense" speculation as adequate; instead, it required specificity and precision in evidence and argument. This was the proper analysis and conclusion. Other courts, however, may use different analyses and come to different conclusions. The Court should take this opportunity to indicate to the lower courts which of these paths is preferable.

II. The Lower Courts Need Guidance on Evaluating An "Appearance of Corruption:"

This case and other recent cases raise the question of how a reviewing court tests an assertion of an "appearance of corruption?" Must evidence that the "risk" is greater than a "mere speculation"

include some evidence of actual *quid pro quo* corruption to support the "appearance?" Do those tests separate an "appearance of influence or access" from an "appearance of corruption?" Do the testing instruments or witness analyses speculate without a foundation or with one that is biased or suspect?

Here, the FEC tried to use badly-drafted public opinion poll questions and "media reports" to show an appearance of corruption. The court below, operating under this Court's and D.C. Circuit interpretations, appropriately rejected the FEC's proffer because it reflected only an appearance of influence or access. J.S.App., at 28a.

It is unclear, however, how the FEC's argument would fare in other courts. Even a partial recitation of a few "appearance of corruption" cases shows that the Circuits are widely split, both internally (as in both *Zimmerman* and *Lair*, described above) and among each other, on how to apply the *quid pro quo* standard for an "appearance of corruption." For example, the spectrum of cases includes:

- In *Zimmerman v. City of Austin, Texas*, the Fifth Circuit required no evidence in the record below of actual corruption in Austin, Texas, and included what Judge Ho described as evidence of influence and access.
- In *Lair v. Motl*, the Ninth Circuit reversed a District Court decision that held that evidence of actual *quid pro quo* corruption was required to sustain a finding of an "appearance of corruption," and included evidence that Judge Ikuta described as evidence of influence and access.

- In *Wagner v. Federal Election Comm'n*, 793 F.3d 1, 10-21, 22 (D.C. Cir. 2015), the D.C. Circuit filled 12 pages of the FEDERAL REPORTER with historical and detailed examples of specific corrupt official acts and actors to demonstrate that government contractors were at the "heartland" of concerns over *quid pro quo* corruption.
- In *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2nd Cir. 2010), the Second Circuit upheld a ban on campaign contributions from government contractors based on a specific, recent scandal, but also struck a ban on lobbyists' contributions because there was no evidence that lobbyists were involved in the scandal. The Second Circuit expressly rejected an "appearance of influence or access" concern that "many members of the public generally distrust lobbyists and the "special attention" they are believed to receive from elected officials" because "the anticorruption interest recognized by *Buckley* and other cases is 'limited to *quid pro quo* corruption', and does not encompass efforts to limit '[f]avoritism and influence' or the 'appearance of influence or access.'" 616 F.3d at 206-07, *quoting, Citizens United*, 558 U.S. at 359-60.
- In *Ognibene v. Parkes*, 671 F.3d 174, 188-89, 190 n. 15, (2nd Cir. 2011), however, the Second Circuit later upheld contribution limits on entities "doing business with" the City of New York because of "direct evidence" of a public perception based on historical and recent "pay-to-play" scandals, but also cited *McConnell* for the proposition that "[i]t is not necessary to produce evidence of actual

corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption." 671 F.3d at 183.

- In *Schickel v. Dilger*, 925 F.3d 858, 870 (6th Cir. 2019), the Sixth Circuit said: "the government 'must show only a cognizable risk of corruption – a risk of quid pro quo corruption or its appearance,' *quoting McConnell*, 540 U.S. at 150, and, although "[t]he threat of corruption must be more than mere conjecture, and cannot be illusory,' the government 'need not produce evidence of actual instances of corruption'", *quoting*, *Ognibene*, 671 F.3d at 183.
- Earlier, in *Lavin v. Husted*, 689 F.3d 543, 547 (6th Cir. 2012), the Sixth Circuit rejected a ban on campaign contributions from Medicaid providers because there was "no evidence at all in support of his theory that [the statute] prevents actual or perceived corruption", and noted that to demonstrate that a contribution limit furthers an interest important enough to suppress political expression and political association, "a state must do more than merely *recite* a general interest in preventing corruption. What *Buckley* requires is a demonstration, not a recitation. … What the state must do, instead, is demonstrate *how* its contribution ban furthers a sufficiently important interest." 689 F.3d at 547 (emphases in original).
- In *The Alabama Democratic Conference v. Attorney General, State of Alabama*, 838 F.3d 1057, 1063-69 (11th Cir. 2016), the 11th Circuit required specific evidence to justify limits on contributions set aside specifically for "independent expenditures" (which are

"expenditures for express advocacy of candidates made totally independently of the candidate and his campaign." *Buckley*, 424 U.S. at 47).

- In *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011), the Fourth Circuit upheld a ban on campaign contributions by "lobbyists, who, experience has taught, are especially susceptible to political corruption" in part because: "The parties agree that limiting the corruption and appearance of corruption that may result from lobbyists' campaign contributions to legislators constitutes a 'sufficiently important interest.'" 660 F.3d at 508. The court did not require anything in the record to show the existence of either *quid pro quo* corruption or a public perception of corruption.

It is within this Court's purview to determine evidentiary burdens required to justify impositions on First Amendment-protected freedoms. Otherwise, states and cities in some Circuits may believe that they need not provide evidence that meets the standards clarified in *Citizens United* and *McCutcheon.*

It isn't necessary for the Court to use this case to update all aspects of the "appearance of corruption" standard to reflect today's conditions, as opposed to those of 1976. All this case requires is that the Court clarify the evidentiary requirements for a government to demonstrate with specific evidence that its claim of the "appearance of corruption" is not "mere conjecture" and poses an actual risk to public confidence in the democratic system.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Public Policy Legal Institute respectfully requests that this Court affirm the decision below with guidance for the lower courts.

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